

IN THE SUPREME COURT OF TEXAS

No. 04-1003

ARTURO FLORES, ET AL., APPELLANTS,

v.

MILLENNIUM INTERESTS, LTD., ET AL., APPELLEES

ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Argued February 15, 2005

JUSTICE BRISTER, joined by CHIEF JUSTICE JEFFERSON and JUSTICE GREEN, dissenting.

The Court answers three certified questions “No”, “No”, and “Not applicable”. As the express words of several statutes require each question to be answered affirmatively, I respectfully dissent.

In an effort to protect those who buy property by contract-for-deed, the Legislature mandated that various disclosures “shall” be made by sellers.¹ Given the purposes behind the statute, there is no question the Legislature intended these disclosures to be mandatory.²

¹ See, e.g., TEX. PROP. CODE §§ 5.066(b), 5.068, 5.069, 5.070(a), 5.071, 5.072(d), 5.074(c), (d) & 5.077(a).

² See TEX. GOV'T CODE § 311.016(2) (noting that unless context requires otherwise, “shall” imposes a duty); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (stating that both “must” and “shall” “are generally recognized as mandatory”).

Among these mandatory disclosures is an annual statement.³ That statement “must include” seven listed items.⁴ To ensure compliance, failure to send an annual statement is punishable by “liquidated damages” of \$250 per day plus attorney’s fees.⁵

In answering the first certified question, the Court “strictly” construes the statute to require fewer items than the statute itself says “must” be included. That is not a very strict construction. Nor does it comply with the legislative mandate that we give the entire statute effect.⁶

In place of the seven statutory items an annual statement “must include,” the Court says the statement need only be “a good faith attempt . . . to inform the purchaser of the current status of their contractual relationship.”⁷ What items such an attempt might include is left for future litigation. After today, instead of a right to specific information, buyers have a right only to litigate whether the statement they got is good enough.

It is true that subsection (a) of the statute mandates annual statements, subsection (b) says what they must include, and subsection (c) states the consequences if a seller “fails to comply with Subsection (a).” But the latter does not mean the Legislature intended to penalize only those who sent nothing at all. Subsection (b) makes clear that a statement without the required information is not an “annual statement,” and thus necessarily violates subsection (a). The Court’s construction

³ TEX. PROP. CODE § 5.077(a).

⁴ *Id.* at §5.077(b).

⁵ *Id.* at §5.077(c).

⁶ TEX. GOV’T CODE § 311.021(2).

⁷ ____ S.W.3d at ____.

leaves no penalty at all for giving less information than the Legislature required, violating the rule that “we must always consider a statute as a whole and attempt to harmonize its various provisions.”⁸

In place of the explicit statutory requirements, the Court adopts good-faith and substantial-compliance standards. These are important and often appropriate standards, but not the ones the Legislature chose to employ here. More important, they are ambiguous at the edges, requiring case-by-case adjudication. That may be good news for those employed in litigation, but not for buyers by contract-for-deed.

The third certified question inquires whether the “liquidated damages” imposed by this statute are “exemplary damages” subject to the substantive and procedural limits of Chapter 41 of the Texas Civil Practices and Remedies Code. That chapter applies broadly to “any action in which a claimant seeks exemplary damages relating to a cause of action,”⁹ and defines such damages as “any damages awarded as a penalty or by way of punishment.”¹⁰

The purchasers argue that Chapter 41 is inapplicable because the damages sought here are designated in the statute as “liquidated” rather than “exemplary” damages. But the caps and other limits on exemplary damages cannot be avoided by simply calling them something else. Chapter 41 defines such damages by what they do, not what they are called. Similarly, “liquidated damages”

⁸ *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002).

⁹ TEX. CIV. PRAC. & REM. CODE § 41.002(a). The word “exemplary” was deleted in 2003, although the substantive provisions of Chapter 41 continue to apply only to “exemplary damages.” Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.03, sec. 41.002, 2003 Tex. Gen. Laws. 847, 888. This change tends to confirm that the Legislature intends a substantive review of all damages based on their nature rather than name.

¹⁰ *Id.* at § 41.001(5). This provision was amended in 2003 to define “exemplary damages” as “any damages awarded as a penalty or by way of punishment *but not for compensatory purposes.*” Act of June 11, 2003, 78th Leg., R.S., ch. 204, § 13.02, sec. 41.001(5), 2003 Tex. Gen. Laws. 847, 887 (emphasis added).

in its ordinary meaning (which we must use as the annual-statement statute does not define the term)¹¹ also turns on substance rather than sobriquet.¹² Thus, whether Chapter 41 applies to the fees imposed here depends not on what they are called, but whether they are “a penalty or by way of punishment.”

The nature of fine here does not make that a difficult question. The fine is assessed daily, though nothing in either the statute or logic suggests how a missing annual statement would cause harm at that regular interval. Further, damages of \$250 a day would total \$7,500 a month and more than \$90,000 a year, figures that all parties and amici assure us are well beyond both the sale price of these properties and the financial resources of those who buy them. And as the buyers themselves concede is the case here, the statutory damages accrue even if the buyers have suffered no damages whatsoever. As a matter of law, the damages imposed here are “a penalty or by way of punishment,” and Chapter 41 applies by its explicit terms.

According to the purchasers, the consequences of taking Chapter 41 at its word would be “staggering,” and would “destroy[] every legislatively enacted damage provision.” First of all, while the application of Chapter 41 to such fees is a new question, the characterization of them as penal

¹¹ TEX. GOV'T CODE § 312.002; *City of Austin v. Sw. Bell Tel. Co.*, 92 S.W.3d 434, 442 (Tex. 2002); *Owens Corning v. Carter*, 997 S.W.2d 560, 577 (Tex. 1999). In *Brown v. De La Cruz*, we held that an amendment to a related portion of the Property Code changing a daily fine from a “penalty” to “liquidated damages” changed “not just the recipient but the nature of the amounts assessed.” 156 S.W.3d 560, 565 (Tex. 2004). But the question in that case was whether a statutory “penalty” implied a private right of action to collect it, a different question from whether a liquidated damages provision is enforceable as a reasonable forecast of damages. See *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991).

¹² See *Phillips*, 820 S.W.2d at 789 (holding contractual provision denominated as “liquidated damages” was nevertheless a penalty, as it provided for ten times actual damages).

or compensatory is not. More than a century ago, this Court held that a flat fine of \$500 was a penalty, even though designated by statute as “liquidated damages.”¹³

Second, the examples the purchasers proffer do not support such exaggerated fears. Two of their examples — attorney’s fees and discovery sanctions — are compensatory rather than punitive. Others either do not relate to a cause of action¹⁴ or were the subject of earlier exceptions expressly repealed by the Legislature.¹⁵

Finally, and most importantly, Chapter 41 expressly provides that its provisions “prevail over all other law to the extent of any conflict.”¹⁶ That leaves little room for exceptions. We cannot presume (as the purchasers do) that the drafters of Chapter 41 forgot about statutory fines like the one here; but even if they did, that would not authorize us to edit their draft.¹⁷ “If Parliament does not mean what it says, it must say so.”¹⁸

As to the second certified question, while the annual statement statute does not require proof of actual damages, Chapter 41 generally permits exemplary damages only if actual damages are more

¹³ *Johnson v. Rolls*, 79 S.W. 513, 514 (Tex. 1904).

¹⁴ TEX. CIV. PRAC. & REM. CODE § 41.002(a).

¹⁵ For example, the purchasers refer to fines that were the subject of a lengthy “laundry list” of exemptions in section 41.002(b), which were repealed in 1995. Act of June 2, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex. Gen. Laws 37, 44, *amended by* Act of Apr. 20, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108. *See* Act of May 21, 1997, 75th Leg., R.S., ch. 165, § 4.01, 1997 Tex. Gen. Laws 327.

¹⁶ TEX. CIV. PRAC. & REM. CODE § 41.002(c).

¹⁷ *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) (holding that even if construction of statute sanctioned injustice, the Court was not at liberty to legislate); *Brown v. De La Cruz*, 156 S.W.3d at 566 (holding that possibility of legislative mistake did not empower court to create private right of action).

¹⁸ *Brazos River Auth. v. City of Graham*, 354 S.W.2d 99, 109 (Tex. 1961).

than nominal.¹⁹ But for causes of action accruing before September 1, 2003 (the time frame applicable to the claims here), actual damages were not a prerequisite if there was clear and convincing evidence of statutory malice.²⁰ Thus, the answer to this question should be “Yes, absent clear-and-convincing evidence of malice.”

While the statute here plainly mandates a daily penalty for every minor omission from an annual statement, the provisions of Chapter 41 plainly ameliorate those penalties when there has been little or no harm. By construing the statutes this way, we might have avoided both eviscerating the annual-statement statute and bestowing financial bonanzas on those who fail to receive them. The answer to all three certified questions should be “Yes”; because the Court concludes otherwise, I respectfully dissent.

Scott Brister
Justice

OPINION DELIVERED: September 30, 2005

¹⁹ TEX. CIV. PRAC. & REM. CODE § 41.004(a).

²⁰ *See id.* at §§ 41.004(b), 41.001(7)(A), *amended by* Act of June 11, 2003, 78th Leg., R.S., ch. 204, §§ 13.05, 13.02, 2003 Tex. Gen. Laws 847, 887-88.